

STATE OF MICHIGAN
COURT OF APPEALS

In re T. MONTIE, Minor.

UNPUBLISHED
May 17, 2016

No. 330605
Gladwin Circuit Court
Family Division
LC No. 13-000110-NA

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Respondent appeals by right the trial court’s order terminating his parental rights to his daughter under MCL 712A.19b(3)(c)(i), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j). Respondent argues that the trial court erred when it terminated his parental rights because petitioner, the Department of Health and Human Services (the Department), created the conditions that led to termination and that the termination process violated his procedural due process rights in a variety of ways. We conclude that the trial court did not err when it terminated respondent’s parental rights.

I. BASIC FACTS

The Department alleged that respondent engaged in sexual misconduct with female minors other than his daughter. The trial court examined the evidence, including two psychological evaluations of respondent, and found that he “would be in fact a danger to” her. The court also had before it respondent’s poor record of compliance with the services provided to him. The trial court found that the Department had proved by clear and convincing evidence grounds for termination of respondent’s parental rights existed under MCL 712A.19b(3)(c)(i), (g), and (j). It also found that termination was in the child’s best interests. MCL 712.19b(5).

II. ANALYSIS

Parents have a fundamental liberty “interest in the companionship, care, custody, and management of their children.” *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003); see *Santosky v Kramer*, 455 US 745, 758-759; 102 S Ct 1388; 71 L Ed 2d 599 (1982). This interest requires the state to “meet a high burden before terminating an individual’s parental rights.” *In re B & J*, 279 Mich App 12, 18; 756 NW2d 234 (2008). Specifically, “[t]he government may not infringe [upon] a fundamental liberty interest unless the infringement is narrowly tailored to serve a compelling state interest.” *Id.* at 22.

A. SUBSTANTIVE DUE PROCESS

Respondent argues that the state violated his substantive due process rights by creating the conditions that led to the filing of the supplemental petition to terminate his parental rights. Because respondent did not preserve this claim of error by raising it before the trial court, our review is for plain error affecting his substantial rights. *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014).

The heart of a substantive due process claim is that government exercised its power arbitrarily and oppressively. *In re B & J*, 279 Mich App at 20 n 4. The party “claiming [the] deprivation . . . must show that the action was so arbitrary as to shock the conscience.” *In re TK*, 306 Mich App at 708. One such arbitrary and oppressive action occurs when a government petitioner seeking termination of parental rights “intentionally set out to create that very ground for termination.” *In re B & J*, 279 Mich App at 19. “[W]hen the state deliberately takes action with the purpose of ‘virtually assur[ing] the creation of a ground for termination of parental rights,’ and then proceeds to seek termination on that very ground, the state violates the due process rights of the parent.” *Id.* at 19-20, quoting *In re Shane P*, 58 Conn App 234, 241; 753 A 2d 409 (Conn App, 2000) (altered by *B & J* Court).

Respondent argues that the state chose to investigate allegations of sexual misconduct made against him by a minor for the purpose of securing a second sexual behavior assessment that could be used to support termination. It is true that the timing of the prosecutor’s investigation of the allegations and the Department’s supplemental petition are correlated. However, the timing of these events is not proof of coordinated motives between the Department and the prosecutor. Indeed, respondent’s argument is a form of the *post hoc, ergo propter hoc* fallacy. Although the prosecutor represented the Department in the termination, as permitted under MCR 3.914, there is no evidence that either the Department or the prosecutor directed the other’s actions to secure termination. On this record, it appears that prosecutor’s office merely exercised its “discretion to criminal wrongdoing, determine which applicable charges a defendant should face, and initiate and conduct criminal proceedings.” *Fieger v Cox*, 274 Mich App 449, 466; 734 NW2d 602 (2007).

Respondent has not demonstrated that the state deliberately created the conditions that led to termination in order to effect the termination.

B. PROCEDURAL DUE PROCESS

Respondent argues that the trial court violated his due process rights in several ways. As with his substantive due process claim, respondent did not assert these claims before the trial court; accordingly, our review is for plain error. *In re TK*, 306 Mich App at 703.

The heart of a procedural due process is notice and an opportunity to be heard. *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.). Such notice must “apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* (quotation marks and citation omitted). A party who faces deprivation of a substantive due process right must “be afforded an opportunity to be heard at a meaningful time and in a meaningful manner.” *Dow v Michigan*, 396 Mich 192, 206; 240 NW2d

450 (1976). However, the process required is “ ‘flexible’ ” and adapted to protect “fundamental fairness.” *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), quoting *Mathews v Eldridge*, 424 US 319, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976). Courts balance three factors to determine the procedure required: (1) the private interest; (2) “ ‘the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards’ ”; and (3) the state’s interest, including “ ‘fiscal and administrative burdens’ ” of additional procedure. *Id.*, quoting *Mathews*, 424 US at 335.

1. TRANSCRIPTS

Respondent first argues that his due process rights were violated when he was provided with inadequate transcripts. Respondent, as appellant, “is responsible for securing the filing of the transcript,” meaning that he must “order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court.” MCR 7.210(B)(1)(a). But in a termination case, “[i]f the court finds that respondent is financially unable to pay for the preparation of the transcripts for appeal, the court must order transcripts provided at public expense.” MCR 3.977(J)(3). Public funding of the transcripts is necessary to protect a parent’s procedural due process right to participate in the appellate process. *Reist v Bay Co Circuit Judge*, 396 Mich 326, 348-349; 241 NW2d 55 (1976) (opinion by LEVIN, J.).

The requirements of MCR 7.210(B)(3) were met. Respondent, an indigent parent, was provided with all of the required transcripts at public expense. MCR 3.977(J)(3); *Reist*, 396 Mich at 348-349. Although there was a delay in providing these transcripts, we addressed that delay when we afforded respondent additional time to file his brief on appeal.¹ Respondent secured all transcripts by the time he filed his brief and, therefore, he was not denied his right to meaningful participation. *Reist*, 396 Mich at 348-349.

Respondent argues that his due process rights were violated because he was provided with an unofficial copy of a transcript. He did not, however, identify the transcript and did not state how any differences prejudiced his ability to proceed on appeal. Respondent “may not merely announce his position and leave it to us to discover and rationalize the basis for his claim.” *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Accordingly, we consider this claim abandoned on appeal.

2. ADJUDICATION DELAY

Respondent argues that his due process rights were violated when the court failed to hold the adjudication trial within 63 days of removing the child from his care and custody. The 63-day time limit stated in MCR 3.972(A) is not absolute. It allows for the trial to be postponed either “on stipulation of the parties for good cause,” “because process cannot be completed,” or “because the court finds that the testimony of a presently unavailable witness is needed.” MCR 3.972(A). The rule further specifies that if the trial is postponed because “process cannot be

¹ *In re Montie*, unpublished order of the Court of Appeals, entered January 20, 2016 (Docket No. 330605).

completed,” “the court shall release the child to the parent . . . unless the court finds that releasing the child . . . will likely result in physical harm or serious emotional damage to the child.” MCR 3.972(A).

In this case, the trial was postponed for more than 63 days to ensure that process was completed. MCR 3.972(A)(2). Initially, his case was set for a bench trial. But ten days before trial, respondent exercised his right to demand a jury trial. *In re Sanders*, 495 Mich 394, 405; 852 NW2d 524 (2014), citing MCR 3.911. The trial court adjourned the matter approximately seven weeks to ensure availability of a courtroom with space for a jury. Therefore, the adjournment and delay beyond 63 days was to ensure that process—providing respondent with the jury trial he requested—was completed.

3. HEARSAY

We also reject respondent’s claim that hearsay was impermissibly admitted at his termination hearing. Respondent fails to cite any authority explaining how the admission of the challenged statements violated his procedural due process rights, or deprived him of notice and an opportunity to be heard. *In re Rood*, 483 Mich at 92.

To the extent that respondent argues that the admission of these hearsay statements violated MCR 3.977(F), he is incorrect. MCR 3.977(F) states that when a petitioner seeks termination of a parent’s parental rights under MCL 712A.19b(3), “on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction,” the trial court must rely on “legally admissible evidence to” to find grounds to terminate. MCR 3.977(F). This requirement exists “because the need to prove the family court’s jurisdiction by legally admissible evidence is entrenched in family court procedures,” and, therefore, “if the petitioner requests termination based on new or changed circumstances, it must retreat to the admissibility standard used in an adjudication.” *In re CR*, 250 Mich App 185, 201-202; 646 NW2d 506 (2001), overruled on other grounds *In re Sanders*, 495 Mich at 394.

Accordingly, because the circumstances are the same, termination under MCL 712A.19b(3)(c)(i) is not governed by MCR 3.977(F)(1)(ii). Instead, termination prompted by a supplemental petition under MCL 712A.19b(3)(c)(i), predicated on the circumstances that caused the trial court to take jurisdiction in the first place, is governed by MCR 3.977(H). When termination is sought on the basis of a supplemental petition under MCR 3.977(H), “[t]he Michigan Rules of Evidence do not apply” at the termination hearing. MCR 3.977(H)(2). Instead, “all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value” so long as the parties had “an opportunity to examine and controvert written reports received by the courts and [are] allowed to cross-examine individuals who made the reports.” MCR 3.977(H)(2). Further, “[t]he requirements of due process do not prevent the admission of hearsay testimony as long as the evidence is fair, reliable and trustworthy.” *In re Ovalle*, 140 Mich App 79, 82; 363 NW2d 731 (1985).

The Department sought termination under MCL 712A.19b(3)(c)(i) in its supplemental petition. The trial court terminated respondent's parental rights, in part, under MCL 712A.19b(3)(c)(i), and the trial court only needed to find clear and convincing evidence of one statutory ground to terminate respondent's parental rights. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012).

4. ABANDONED CLAIMS

Finally, respondent listed 17 irregularities that he argues constituted due process violations. Most of these claims are not supported by adequate citation to the record. MCR 7.212(C)(7). And respondent failed to explain how any of these alleged irregularities violated his procedural rights and did not cite any authority in support of his claims of error. Consequently, he abandoned these claims of error on appeal. *Ewald v Ewald*, 292 Mich App 706, 726; 810 NW2d 396 (2011).

III. CONCLUSION

Respondent has not challenged the trial court's finding that the Department established at least one ground for termination by clear and convincing evidence and its finding that termination was in the child's best interests. Because respondent has not established any other error warranting relief, we affirm.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Michael J. Kelly